

United States Court of Appeals  
For the Ninth Circuit

---

TRANS WORLD AIRLINES, INC., a corporation,  
*Appellant,*

VS.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM McKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,

*Appellees.*

APPELLANT'S OPENING BRIEF.

---

LOYD WRIGHT,

1125 - 111 West Seventh Street, Los Angeles 14, California,

EUGENE M. PRINCE,

Standard Oil Building, San Francisco 4, California,

CHARLES A. LORING,

1125 - 111 West Seventh Street, Los Angeles 14, California,

NOEL DYER,

Standard Oil Building, San Francisco 4, California,

*Attorneys for Appellant.*

WRIGHT, WRIGHT, GREEN AND WRIGHT,

1125 - 111 West Seventh Street, Los Angeles 14, California,

PILLSBURY, MADISON & SUTRO,

Standard Oil Building, San Francisco 4, California,

*Of Counsel.*

FILED

APR - 1 1955



## Table of Contents

---

	Page
Jurisdictional Statement .....	1
(Jurisdiction of the trial court is established by diversity of citizenship and jurisdictional amount under 28 U.S.C. 1332, and jurisdiction of this court under 28 U.S.C. 1291, 2201, by a timely appeal from a final judgment for declaratory relief.)	
Statement of the Case .....	3
A. Preliminary Statement .....	3
B. Narrative Statement .....	7
(Appellant, Trans World Airlines, Inc., sued the City and County of San Francisco for a declaratory judgment that a lease-contract with the City dated October 1, 1942, is binding. By this instrument the City granted TWA for a 20-year term at stated charges the right to use facilities of the San Francisco International Airport. As to part of the facilities the City admits the agreement to be binding; as to runways and other facilities used by all airlines ("common use facilities"), the City contends that the charges provided in the agreement have been superseded by a schedule adopted by the City's Public Utilities Commission effective January 1, 1951. The trial court entered a declaratory judgment sustaining this contention, and TWA appeals.)	
Specification of Errors.....	14
Summary of Argument .....	19
Argument .....	23
I. Assuming, Without Conceding, That the City Has Rate-Making Power with Respect to Use of the Airport Facilities by the Airlines, It Also Has and Had in 1942 Explicit Statutory Authority to Contract Regarding Charges for and Conditions of Such Use; i.e., Authority to Make the Lease-Contract in the Case at Bar. Having Elected to Contract Rather Than to	

	Page
Proceed by Regulatory Process, the City is Bound by the Contract for Its Full Term.....	23
A. The City's authority to make the contract in suit	23
1. The state statute.....	23
2. The charter—Since the state statute contains an explicit grant of contracting power, there is no need to consider other provisions of the law. But if the charter and state constitutional provisions about municipal home rule were material, these also would sustain the contracting power material to the case at bar....	25
3. Administrative construction .....	31
B. A municipality having both contracting and regulatory powers, and having chosen in a given case to proceed by contract, is bound by that contract	33
1. The authorities .....	33
2. The trial court's distinction of the above authorities is not valid, and the authorities cited by the trial court are not in point.....	38
C. California cases dealing with municipal contracts generally .....	42
D. The Federal and state constitutions prohibit the City from setting aside any portion of the contract in suit.....	43
II. If the Court Were Required to Decide Whether the City Has Power to Treat Charges to the Airlines for Common Use Facilities as Public Utility Rates, the Decision Would Necessarily Be in the Negative.....	44
A. Analysis of charter provisions under which the City claims utility rate-making authority.....	46
B. Settled principles of statutory construction and long-continued administrative construction of the charter are against the City's claim of rate-making authority .....	49
C. The City's assumption that the airport is a "public utility" for municipal rate-making purposes is	

	Page
not valid, but if it were would not sustain the power here claimed.....	50
III. Even If the Contract Were Voidable by the Exercise of Utility Rate-Making Power, Still the Present Judgment Could Not Stand Because the City Has Not Taken Action Sufficient to Avoid the Contract.....	53
A. The trial court held that the 1951 schedule of the City Public Utilities Commission partially superseded the 1942 agreement, but the schedule itself expressly excepted existing agreements from its operation .....	53
B. The contract even if voidable, would not be avoided unless and until the Public Utilities Commission made an express finding after hearing that the contract is unreasonable and against public interest. There has been no such hearing or finding..	54
Conclusion .....	56

## Table of Contents to Appendix

---

	Page
Constitution of the State of California, Article XI, Section 6, Municipal Corporations .....	i
Constitution of the State of California, Article XI, Section 8(j), Municipal Affairs.....	ii
California Municipal and County Airport Law, Cal.Stats. 1927, c. 267, p. 485.....	ii
California Government Code, Sections 50001, 50470, 50474-8, which superseded the Municipal and County Airport Law, and deal with municipal airports .....	iv
California Government Code, Section 26020, dealing with au- thority of county supervisors concerning county airports..	vii
Charter of the City and County of San Francisco, Sections 2, 93, 121, 130 .....	viii
Federal Civil Aeronautics Act of 1938, 49 U.S.C. 642, subd. (d), giving the Civil Aeronautics Board power to regulate rates for air transportation.....	xiv

## Table of Authorities Cited

Cases	Pages
A	
Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466....	50, 52
Allen W. Hinkel Dry Goods Co. v. Wichison I. Gas Co., 64 F.2d 881 .....	55
Attleboro Steam & E. Co. v. Narragansett E. Light Co., 295 Fed. 895 .....	55
B	
Bay Cities Transit Co. v. Los Angeles, 16 Cal.2d 772, 108 P.2d 435 .....	25
Brewster v. Gage, 280 U.S. 327 .....	33
Brown v. Town of Sebastopol, 153 Cal. 704, 96 Pac. 363....	43
C	
Chapman v. State, 104 Cal. 690, 38 Pac. 457.....	43
City of Des Moines v. City of West Des Moines, 239 Iowa 1, 30 N.W.2d 500 .....	53
City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P. 2d 894 .....	27
City of Oakland v. Brock, 8 Cal.2d 639, 67 P.2d 344 .....	52
City of Oakland, The v. Williams, 15 Cal.2d 542, 103 P.2d 168.....	27
City of Toledo v. Jenkins, 143 Ohio St. 141, 54 N.E.2d 656.	52
Civic Center Assn. v. Railroad Comm., 175 Cal. 441, 166 Pac. 351 .....	25
Coleman v. City of Oakland, 110 Cal.App. 715, 295 Pac. 59.	45
Colorado Interstate Gas Co. v. Federal Power Com'n, 142 F. 2d 943 .....	56
Commonwealth v. Shenandoah River Light & P. Corp., 135 Va. 47, 115 S.E. 695.....	55
D	
Delno v. Market St. Ry. Co., 124 F.2d 965.....	3
Des Moines, City of v. City of West Des Moines, 239 Iowa 1, 30 N.W.2d 500.....	53

E	Pages
Ex Parte Houston, 93 Okl.Crim. 26, 224 P.2d 281.....	25, 29, 51
F	
Femmer v. City of Juneau, 97 F.2d 649 .....	28, 37, 38, 45
G	
Grass Valley, City of v. Walkinshaw, 34 Cal.2d 595, 212 P. 2d 894 .....	27
Guy F. Atkinson Co. v. Offner, 86 Cal.App.2d 92, 194 P.2d 33.....	42
H	
Hensler v. Los Angeles, 124 Cal.App.2d 71, 268 P.2d 12....	43
Hinkel, Allen W. Dry Goods Co. v. Wichison I. Gas. Co., 64 F.2d 881.....	55
Home Telephone Co. v. Los Angeles, 211 U.S. 265 .....	15, 37
Housing Authority v. City of Los Angeles, 40 Cal.2d 682, 256 P.2d 4.....	33
Houston, Ex Parte, 93 Okl.Crim. 26, 224 P.2d 281.....	25, 29, 51
I	
Interstate Com. Commission v. Railway Co., 167 U.S. 479...	50
J	
Jefferson Deposit Co. v. Central Illinois Light Co., 309 Ill. 262, 140 N.E. 817 .....	55
K	
Kaul v. American Independent Telephone Co., 95 Kan. 1, 147 Pac. 1130 .....	55
Kemper Const. Co., M. F. v. City of L. A., 37 Cal.2d 696, 235 P.2d 12.....	43
Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 51 P.2d 1098.....	24
L	
Lamb v. Calif. Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371	55
Law v. Railroad Commission, 184 Cal. 737, 195 Pac. 423....	41

## Pages

Limoneira Co. v. Railroad Commission, 174 Cal. 232, 162 Pac. 1033 .....	41
Los Angeles v. Superior Court, 17 Cal.2d 707, 112 P.2d 10	33
Los Angeles Ry. Corp. v. Los Angeles, 16 Cal.2d 779, 108 P. 2d 430 .....	25

## M

M. F. Kemper Const. Co. v. City of L. A., 37 Cal.2d 696, 235 P.2d 12.....	43
Marin Water etc. Co. v. Town of Sausalito, 168 Cal. 587, 143 Pac. 767.....	45, 52
Meyer v. State Land Settlement Board, 99 Cal.App. 337, 278 Pac. 452.....	43
Midland Co. v. K. C. Power Co., 300 U.S. 109.....	41
Miami Beach Airline Service v. Crandon, 159 Fla. 504, 32 So.2d 153 .....	29
Milwaukee County v. Town of Lake, 259 Wis. 208, 48 N.W. 2d 1 .....	29
Mobile Gas Service Cor. v. Federal Power Commission, 215 F.2d 883, certiorari granted Feb. 28, 1955 .....	55, 56
Mulville v. City of San Diego, 183 Cal. 734, 192 Pac. 702...	52

## N

Nelson v. Dean, 27 Cal.2d 873, 168 P.2d 16.....	33
Norman v. B. & O. R. Co., 294 U.S. 240.....	40

## O

Oakland, City of v. Brock, 8 Cal.2d 639, 67 P.2d 344.....	52
Oakland, The City of v. Williams, 15 Cal.2d 542, 103 P.2d 168.....	27

## P

Pacific Tel. & Tel. Co. v. Public Utilities Com., 34 Cal.2d 822, 215 P.2d 441 .....	52
Palaske v. City of Long Beach, 93 Cal.App.2d 120, 208 P.2d 764.....	33
Pearl River County v. Wyatt Lumber Co., 270 Fed. 26.....	3
People v. Western Air Lines, Inc., 42 Cal.2d 621, 268 P.2d 723.....	25, 45

	Pages
Perry v. United States, 294 U.S. 330.....	40
Pignet v. City of Santa Monica, 29 Cal.App.2d 286, 84 P.2d 166.....	45
Pinney & Boyle Co. v. L. A. Gas etc. Corp., 168 Cal. 12, 141 Pac. 620.....	41
Pipes v. Hilderbrand, 110 Cal.App.2d 645, 243 P.2d 123....	24
Power Comm'n v. Panhandle Co., 337 U.S. 498.....	33
Public Service Co. v. St. Cloud, 265 U.S. 352 .....	15, 30, 33, 38

## R

R. R. Comm'n v. Los Angeles R. Co., 280 U.S. 145.....	37
Richfield Oil Corp. v. Crawford, 39 Cal.2d 729, 249 P.2d 600	33
Riverside & A. Ry. Co. v. City of Riverside, 118 Fed. 736..	36, 44
Rutland Ry., Light & Power Co. v. Burditt Bros., 94 Vt. 421, 111 Atl. 582.....	55

## S

Samuelson v. Public Utilities Com., 36 Cal.2d 722, 227 P.2d 256.....	50
San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036 .....	27
Sierra Pacific Power Co. v. Federal Power Commission, 23 U.S. Law Week 1133, 2441.....	55, 57
Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175.....	47, 49
South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 93 Pac. 490.....	45
Southern Pac. Co. v. Spring Valley W. Co., 173 Cal. 291, 159 Pac. 865.....	55

## T

Toledo, City of v. Jenkins, 143 Ohio St. 141, 54 N.E.2d 656	52
Traverse City v. Citizens' Telephone Co., 195 Mich. 373, 161 N.W. 983 .....	55
Tyler Gas Service Co. v. United States Gas Pipe Line Co., 217 F.2d 73 .....	55

## U

U. S. v. Chicago North Shore R. Co., 288 U.S. 1.....	33
Union Dry Goods Co. v. Georgia P. S. Corp., 248 U.S. 372..	41

## V

## Pages

Van Hoosear v. Railroad Commission, 184 Cal. 553, 194 Pac. 1003.....	50
Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496.....	35, 44
Vicksburg v. Waterworks Co., 202 U.S. 453.....	36

## W

West Coast Adver. Co. v. San Francisco, 14 Cal.2d 516, 95 P.2d 138 .....	26, 29
Western Distributing Co. v. City of Mulvane, 116 Kan. 472, 227 Pac. 362.....	55
Wichita R.R. v. Pub. Util. Comm., 260 U.S. 48.....	55

## Other Authorities

## Constitution of California:

Art. I, sec. 13.....	19, 43
Art. I, sec. 16.....	19, 43
Art. XI, secs. 6, 8(j).....	25

## Constitution of the United States:

Art. I, sec. 8.....	19
Art. I, sec. 10.....	19, 43

## Fourteenth Amendment to the Constitution .....19, 43

## Compiled Laws of Alaska 1933, sec. 2383..... 39

## Cal.Stats. 1927, p. 485 (Municipal and County Airport Law) 23

## Cal.Stats. 1931, c. 56, p. 2973 (Charter of the City and County of San Francisco)..... 27

## Cal.Stats. 1st Ex.Sess. 1946, c. 8, pp. 219, 221..... 28

## Civil Code, sec. 1635..... 43

## Government Code:

Sec. 26020 .....	24
Secs. 50470-50478 .....	24

## Political Code, sec. 4056c..... 24

	Pages
28 U.S.C. 1291.....	3
28 U.S.C. 1332.....	2
28 U.S.C. 2107.....	3
28 U.S.C. 2201.....	3
49 U.S.C. 642.....	25
57 Harv.L.Rev. 512, 663 .....	37, 44

# United States Court of Appeals For the Ninth Circuit

---

TRANS WORLD AIRLINES, INC., a corporation,  
*Appellant,*

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM MCKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,

*Appellees.*

## APPELLANT'S OPENING BRIEF.

---

### JURISDICTIONAL STATEMENT.

Plaintiff-appellant, Trans World Airlines, Inc., appeals from a decree denying declaratory and injunctive relief to plaintiff, and awarding to defendant-appellee, City and County of San Francisco, on its cross complaint, declara-

tory relief and a money recovery of \$95,942.64 (Tr. 3, 72, 226-227).<sup>1</sup>

The point in controversy is whether a written lease between the parties dated October 1, 1942, with later supplements, regarding TWA's use of land, building space and facilities at San Francisco International Airport (Tr. 14-54), is a binding obligation as claimed by TWA, or whether it has been superseded in part by an alleged public utility rate schedule of the City's Public Utility Commission (Tr. 55). The City admits that the lease is a binding contract as to some of the items covered, but denies its obligation as to others (Tr. 242, 390 and *infra* 13). The controversy arises in the manner explained in the statement of the case. The District Court filed a written opinion and findings and entered judgment favorable to the City (Tr. 167, 198, 223; opinion reported at 119 F.Supp. 516).

Jurisdiction of the District Court was based on section 1332 of Title 28 of the United States Code. Diversity of citizenship, and an amount in controversy exceeding \$3,000, are admitted by the pleadings (Tr. 3-4).<sup>2</sup> As to diversity, TWA is a Delaware corporation (Tr. 3) and the City is a California municipal corporation (Tr. 4); therefore a California citizen for purposes of jurisdiction.

---

<sup>1</sup>Henceforth in this brief the parties will be called "TWA" and the "City." All emphasis in the brief is ours unless otherwise stated.

<sup>2</sup>The City's answer replies to some allegations of TWA by reference to numbers of pages and lines of the complaint as filed in the District Court (see Answer, Tr. 72-80). These page and line numbers are not reproduced in the printed transcript. Hence wherever we refer to a fact as admitted by the pleadings, we have verified the admission by comparison of the original pleadings.

based on diversity (*Pearl River County v. Wyatt Lumber Co.* (5 Cir. 1921) 270 Fed. 26, 28, and many authorities cited).

The jurisdiction of this Court rests upon sections 1291 and 2201 of Title 28 of the United States Code. The judgment of the District Court is final and appealable under section 2201 (*Delno v. Market St. Ry. Co.* (9 Cir. 1942) 124 F.2d 965). The judgment was entered July 6, 1954; notice of appeal was filed August 2, 1954 (Tr. 227), and was timely under section 2107 of Title 28 of the United States Code.

---

## STATEMENT OF THE CASE.

### A. PRELIMINARY STATEMENT.

The written agreement involved in this suit, entitled a "lease," was executed on October 1, 1942, for a term of 20 years (Tr. 14-36). Thereby the City granted TWA the right to use hangar No. 4 at San Francisco International Airport and other land and building space for hangars, repair shops, and like purposes (Tr. 15-18). It also granted the right to use landing strips, ramps, taxiways, fueling equipment, lights, signals, baggage and passenger areas, and other airport facilities (Tr. 18-24). These latter for convenience are called "common use facilities," since they are used by all airlines.

The agreement on its face is not divisible as to obligation (see sec. 22, Tr. 34), and, as later shown, both parties treated it as binding in all respects up to 1951 (*infra* 10-12, 31-32). The City still concedes that the agreement is binding for its full term in so far as it grants TWA land or

building space for hangars and shops (Tr. 242, 390). But as to the landing strips, taxiways and other common use facilities, the City claims that the contract may be altered at any time by the City's Public Utilities Commission in the exercise of an alleged power of public utility rate making (Tr. 77 et seq., 115-116); further, that the contract has been so altered and that higher charges have been imposed for the common use facilities by a schedule adopted by the Commission, effective January 1, 1951 (Tr. 55). This contention was sustained by the trial court (Tr. 167, 198, 223), and the correctness of its ruling is the question on this appeal.

Not to anticipate argument, but to point up the questions with which this brief will deal, we note here that the City has now, and had in 1942, *express statutory authority* to contract with the airlines about the use of the airport facilities, and that this authority extended and still extends to common use facilities as well as to hangars and shop space (see *infra* 23-33, and statutory quotations in appendix). TWA contends that the lease-contract in suit is, therefore, binding in its entirety.

As to the alleged utility rate-making power, TWA believes that under a proper construction of the law, the power does not exist over the subject matter in suit; i.e., the use by the airlines of common facilities of the airport. But this appeal does not require determination of whether such rate-making power exists or not. If the City *has* rate-making powers, it also has and had in 1942 full power to *contract* concerning the use of airport facilities. This contracting power is, as we contend, decisive of the case. Where a municipality has power in a given situation

**either** to contract or to regulate, and chooses to proceed by contract, then, under cases later cited, it is bound by the contract for the full contract term.

The instrument by which the City claims that the agreement of 1942 was partially superseded was adopted by the City Public Utilities Commission, effective January 31, 1951, and is entitled "Rates and Charges, San Francisco Airport" (Tr. 55). The opening paragraph of this instrument reads as follows (Tr. 55):

"Section 1. General Provisions: *Except as otherwise provided, or amended by agreement*, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport."

Since the above language excepts the agreement in suit from the effect of the schedule it follows to the direct contrary of the judgment appealed from that the schedule could not partially or at all supersede the agreement. It follows also that the judgment could not stand even if the contract were partially voidable by regulatory authority as the City contends. Where a contract is voidable in this way, it remains in effect unless and until the regulatory body after a hearing on that particular contract expressly sets it aside as against public interest (authorities, *infra* 53-57). Here the Commission not only failed to take such action but expressly excepted existing agreements from its schedule. This point is not mentioned in the trial court's decision, and is, we will argue, an independent reason why the judgment cannot be justified. The fundamental point, however, is that the 1942 lease is not partially voidable, but was lawfully made and is entirely binding.

This appeal involves no issue of fact. The trial court found against the one factual defense made by the City (Tr. 178, 216-217, 220), namely, that the 1942 agreement, if it was a valid contract to begin with, has been avoided by commercial frustration (Tr. 73-74, 86-88, 240-241, 342, et seq.). The City's point was that the parties did not in 1942 contemplate the coming of the large size planes now in use which require larger airports and involve much more wear and tear on facilities (Tr. 73-74, 86-88). The trial court's finding against this defense (Tr. 216-217) is well supported; among other things, by testimony of Mr. Bernard M. Doolin, airport manager in 1942, who participated for the City in negotiating the TWA lease (Tr. 324):

“Q. But you did have in contemplation planes in excess of 25,000 pounds?

A. Oh, yes, yes.”

Further, the contract itself provided for added charges increasing with weight for planes weighing more than 25,500 pounds (Tr. 21).

Though the case turns on law points, we offer a further and narrative statement of the facts. The facts are not in dispute, and they establish a practical administrative construction consistent and only consistent with the entire validity of the 1942 agreement.

The agreement itself, three supplements to it, and the City's “rate schedule” of January 1, 1951, are printed in full in the transcript (Tr. 14-72). Certain bulky exhibits, such as recapitulations of invoices, flight statistics, official records, etc., are before the court in original form.

(Tr. 723-724). The appendix to this brief contains a reprint of pertinent constitutional, statutory and charter provisions.

---

## B. NARRATIVE STATEMENT.

The City and County of San Francisco built and operates the San Francisco International Airport. The airport is situated in San Mateo County. Its facilities are utilized by military aircraft, and by private aircraft of all kinds, including at the time of trial twelve scheduled airlines of which TWA is one (Tr. 373). In 1952 the airport served about 3,250,000 members of the public, of whom about 2,500,000 were airline passengers (Tr. 374). Two of the twelve scheduled airlines, namely TWA and United Air Lines, have term contracts with the City for the use of land and facilities (Tr. 393, 453).

TWA is a national and international air carrier, operating out of 51 airports in the United States and 20 abroad (Tr. 245). It uses facilities of municipal airports in this country under contracts, and, until the present controversy arose, such use had nowhere been made a matter of municipal rate regulation (Tr. 268).

TWA's operations at the San Francisco Airport on an important scale go back to 1937 (Tr. 292). There was then no contract with the City and the airport was used on a month-to-month basis (Tr. 277, 308). However, the parties soon started talking about a long-term arrangement and got down to discussing specific provisions about

a year before they executed the agreement of October 1, 1942 (Tr. 280, 312). The airport then had only two scheduled air carriers, TWA and United Air Lines (Tr. 277, 308).

As to the City's reason for wanting a long-time arrangement, Mr. Doolin, airport manager in 1942 and for a long time before and after, testified (Tr. 315):

“Q. During the course of these discussions, Mr. Doolin, did you advance any reasons as to why the City should enter into a lease agreement?

[Objection made and overruled.]

A. Yes, definitely. For the purpose, of course, of the discussions, to obtain permanency of operations of airlines into San Francisco and assure the continued use of the Airport and the service to the City.”

Mr. Doolin testified also that competition with other airports was an inducing factor to the City to make the 1942 lease (Tr. 317-318). To questions by TWA counsel intended to bring out specifically that the City wanted a long-term lease in order to forestall TWA's making bay area headquarters at the Oakland Airport, the trial court sustained an objection (Tr. 316-317).

The lease term was agreed on as 20 years (Tr. 284-285, 318). As charges the City suggested the same figures as in the 1941 schedule of the Public Utilities Commission then current (Tr. 285, 469); TWA agreed after considerable protest on the ground that the amounts were too high (Tr. 285). The charges were written into the contract (Tr. 16-18, 20-21); the contract did not mention the Commission schedule or incorporate anything by reference to it. That

the charges could be increased by the Public Utilities Commission was not contemplated.<sup>3</sup>

The lease details the uses which TWA can make of the common facilities at the airport (Tr. 18-22).<sup>4</sup> It also details the City's obligations to maintain and operate the whole airport, including specifically the common use facilities (Tr. 23-24). These rights and obligations were part of the negotiated arrangements between the City and TWA. As said before, the charges were not left to be covered by the current schedule of charges or any future schedule. In respect to one matter only, namely, the right to store aircraft in hangars which might be operated by the City, the lease provided that the rates should be whatever might be currently charged (Lease, par. 3, subd. 4, Tr. 19). The City operated no storage hangar in 1942, and the con-

---

<sup>3</sup>Mr. Andrews, one of the negotiators for TWA, testified (Tr. 286):

"The lease was to protect us against any changes in the rates in the future over that period."

Mr. Doolin, airport manager and one of the negotiators for the City, testified that the agreement was made

"\* \* \* in order to give them—to work out a suitable lease for permanent operating arrangement" (Tr. 308; see also Tr. 315).

In the agreement itself is section 13, providing (Tr. 28-29):

"13. Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor, directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement."

<sup>4</sup>The term "common use facilities" is used throughout this brief, unless noted otherwise, as referring to areas and facilities used in common by the *airlines*. The City has not asserted utility rate-making power over airport facilities used in common by others, such as limousine and taxi operators and many other enterprises (Tr. 384-390).

tract could not intelligently specify charges for a nonexistent service; consequently provided in the manner mentioned for charges for such service if ever rendered (Tr. 299-300).

The first draft of a definitive agreement was made by Mr. Doolin, the airport manager; several drafts were then worked into final form by the City Attorney's office (Tr. 310). The agreement was approved by the City Attorney, the Manager of Utilities, and the Director of Properties (Tr. 36); it was recommended by the Public Utilities Commission (Tr. 39) and executed by the Mayor after unanimous authorization by the Board of Supervisors (Tr. 36-41), and after an advertised call for bids for use of everything involved, land, space and facilities (Tr. 37-39).

On May 31, 1946, the parties made a supplementary agreement for added floor space in the administration building (Tr. 41-43). By supplementary agreement dated November 1, 1947, TWA acquired a gasoline storage area on a rental basis (Tr. 45-52). By supplementary agreement dated June 2, 1948, the parties renegotiated the rental for space in hangar No. 4 (Tr. 52), an escalation for which the original agreement of 1942 had provided (Tr. 16-17). The amendments to the contract in 1947 and 1948 provided for similar charges to those established by the current schedule of the Public Utilities Commission for the particular items involved, but the changes were effected as a matter of contract and without reference to public utility rate-making powers. Thus the agreement of June 2, 1948, provided (Tr. 53):

“Whereas, this Memorandum of Understanding between the City and TWA does hereby revise and pro-

vide that the certain charges incorporated in Paragraph Number 1 will concur with those established by the City.

Now Therefore, it is mutually agreed between the City and TWA that effective October 1, 1947, the rental shall be \* \* \* .”

All the supplementary agreements refer to and affirm the original agreement. Illustrative is the agreement of June 2, 1948 (Tr. 54):

“It is specifically understood and agreed that except as modified by this instrument, all of the terms and conditions of said agreement of Lease, dated October 1, 1942 between the City, as Lessor, and TWA, as Lessee, shall remain in full force and effect.”

In 1946 the Public Utilities Commission made a new schedule of rates and charges for the airport (City’s Exh. B, on file as original exhibit, Tr. 721). This schedule was originally to be effective September 1, 1946 (Tr. 721), but the date was later postponed to January 7, 1947 (City’s Original Exh. S-5, a copy of PUC resolution 7899). The opening paragraph of this schedule read (City’s Original Exh. B):

“Section 1. General Provisions: Except as otherwise provided, or amended by agreement, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

The scheduled charges were higher than those set in the TWA contract, but the City nevertheless, and consistently with the exception in the schedule, continued to bill TWA at contract rates (Tr. 248, 254).

In December of 1947, and while the 1946 rate schedule remained in effect, the City made a lease and agreement with United Air Lines, of similar general nature to the agreement in suit with TWA (Tr. 393); thus again proceeding under its contracting powers, without regard or reference to its supposed power of rate regulation.

On June 1, 1949, the City put into service a new concrete ramp or unloading apron in front of the hangars (Tr. 90, 258). For use of this ramp the City billed TWA for amounts additional to the contract charges (Tr. 258). Relying on the contract, TWA did not pay these bills (Tr. 258-259).

On November 20, 1950, after notice and public hearing,<sup>5</sup> the Public Utilities Commission adopted the schedule, effective January 1, 1951, on which the City here relies. While the City now contends that this schedule superseded the contract of October 1, 1942, as to the common use facilities, the schedule itself negatives any such intention or effect. Its opening paragraph, like that of the 1946 schedule, read (Tr. 55):

“Section 1. General Provisions: *Except as otherwise provided, or amended by agreement*, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

As to whether the schedule is a public utility rate schedule, it does not say so, and in fact applies to many

---

<sup>5</sup>Def. Exhs. T-1—T-4, here as original exhibits (Tr. 722).

matters, such as rentals for shop space, which the City admits are not subject to rate regulation (see Tr. 55-72).<sup>6</sup> Further, while the schedule is entitled "Rates and Charges, San Francisco Airport," it does not cover such a field. The charges are set for the use of facilities by aircraft operators and for various matters relating to delivery of petroleum products for aircraft use (Tr. 68-72). The numerous other businesses and concessions operating at the airport are not mentioned in the schedule and are affected, if at all, only by some of the rental provisions which the City admits are not subjects of utility rate making (see Tr. 384-390).

In January, 1951, the City notified TWA that it must make payments under the Commission schedule or it would not be allowed to fuel its planes (Tr. 9-10, 264). TWA then filed this suit. Since the City did not actually shut off TWA's continued use of the facilities there was no hearing on TWA's request for preliminary injunction (Tr. 13). The case was tried and the court entered judgment that section 3 of the agreement of October 1, 1942, relative to common use facilities was superseded by the rate schedule of January 1, 1951 (Tr. 225); also awarding a money recovery of \$95,942.64 for the difference between

---

<sup>6</sup>The City contended and the District Court found that the Commission exercised rate-making power under section 130 of the Charter in promulgating the rates and charges in Part III and Part X, section 2 of the 1951 schedule (Conclusions of Law Nos. 5, 17, 19, Tr. 218, 221). With respect to other sections of the schedule, e.g., Part IV, "Rental of an Entire Building or Structure—Rental of a Partial Building or Structure" (Tr. 60); Part VI, "Rental of Airport Property—Unimproved" (Tr. 62); Part VII, "Rental of Airport Property—Paved Areas" (Tr. 63); and Part IX, "Rental of Passenger Terminal Building Office Space" (Tr. 65)—the City admits that public utility rates are not involved (Tr. 242, 390).

the contract charges and the schedule charges from January 1, 1951, to February 28, 1954 (Tr. 226). TWA has taken this appeal (Tr. 227).

---

### **SPECIFICATION OF ERRORS.**

Appellant, TWA, hereby specifies the errors intended to be urged on this appeal and states that the District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as "District Court"), in rendering the judgment appealed from, erred in the following particulars severally and collectively:

1. In entering any judgment either for money or other relief for appellee, City, and in denying TWA's application for relief as prayed in the complaint.

2. In deciding and adjudging that the furnishing of ramps, runways, taxiways, beacons, signals, lights, control tower, fire protective service and other so-called "common use facilities" at the San Francisco International Airport to TWA and other airlines constitutes a public utility service for which public utility rates can be charged.

3. In deciding and adjudging that TWA and other airlines are the public served by said Airport.

4. In deciding and adjudging that in establishing charges for the use of facilities by TWA and other airlines at said Airport, the City exercises governmental and legislative rate-making power and does not act in its proprietary capacity.

5. In deciding and adjudging that the lease and agreement dated October 1, 1942, whereby the City leased land and facilities at the San Francisco Airport to TWA, is a public utility rate contract.

6. In not deciding and adjudging that the Constitution and statutes of the State of California and the Charter of the City authorized the City to make said lease and agreement concerning facilities at the San Francisco Airport and to fix the rates and charges therefor for a definite and agreed term, and in not deciding that the City, having elected to exercise such power to contract as to said lease and agreement, is bound thereby for the term thereof and that its governmental power of fixing and regulating said rates and charges (if such exists) is not applicable to said lease and agreement.

7. In deciding that the doctrine of *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and like cases, is inapplicable to said lease and agreement.

8. In deciding and adjudging that the City through its Public Utilities Commission had jurisdiction to establish rates for the alleged public utility service here involved outside the territorial limits of the City and that the City can exercise such police power or legislative rate-fixing power beyond its territorial limits and jurisdiction.

9. In deciding and adjudging that the City has jurisdiction by unilateral action to alter said lease and agreement.

10. In deciding and adjudging that said lease and agreement is subject to the rate-making jurisdiction of

the Public Utilities Commission of the City in so far as "common use facilities" at the San Francisco Airport are concerned.

11. In not finding that the City received fair and just consideration for said lease and agreement; in sustaining objections of counsel for the City to questions asked by counsel for TWA of the witness Bernard M. Doolin for the purpose of showing that one of the reasons the City entered into said lease and agreement was to have TWA operating out of the San Francisco Airport as a national and international air carrier, and to prevent TWA from going to another airport such as Oakland, which, at the time said lease and agreement was entered into, was competing with the San Francisco Airport for airline service and patronage (Tr. 315-318). TWA counsel stated to the trial court in support of the admission of said evidence that competition between the San Francisco Airport and other airports for the services, schedules and patronage of the airlines was pertinent to the determination of whether different rates could be charged to different airlines if the Court should hold, contrary to TWA's contention, that the City's rates for common use facilities are public utility rates (Tr. 315-317).

12. In deciding and adjudging that during the term of said lease and agreement the City regulated and prescribed or had lawful authority to regulate and prescribe public utility rates applicable to TWA for the use of facilities at the San Francisco Airport.

13. In deciding and adjudging that the mere promulgation of a general rate schedule is sufficient to super

sede or invalidate said lease and agreement providing specific charges; further in deciding and adjudging that, as a matter of law, the said schedule effective January 1, 1951, superseded section 3, another provision of said lease and agreement.

14. In deciding and adjudging that the City lawfully regulated or purported to regulate facility charges set forth in said lease and agreement of October 1, 1942, said decision and judgment being erroneous because:

a. The alleged rate schedule effective January 1, 1951, by which the Court holds that said lease and agreement was partially superseded, expressly provided that said schedule should be effective except as otherwise provided or amended by agreement, and so excepted said lease and agreement of October 1, 1942, from the scope and effect of said schedule.

b. The City has never held any hearing upon the lawfulness, reasonableness and validity of the charges specified in said lease and agreement; and

c. The City has never made a finding that said lease charges for the use of airport facilities are unreasonable, unlawful or invalid.

15. In allowing recovery for any period in accordance with said alleged public utility rate schedule effective January 1, 1951, because even if the City has powers as claimed by it to avoid in part the obligation of said lease and agreement, the City has taken no action sufficient to avoid it.

16. In deciding and adjudging that the rates and charges set forth in Part III of said schedule effective

January 1, 1951, constitute rates and charges for "common use facilities" at said Airport and supersede the charges for "common use facilities" set forth in section 3 of said lease and agreement, and that TWA is obligated to pay to the City rates and charges as set forth in said Part III of said general schedule; for this reason the District Court also erred in finding and adjudging that there is due and owing and unpaid from TWA to the City for the period from January 1, 1951, to and including February 28, 1954, the sum of \$86,342.64 or any sum as and for flight departure charges in accordance with the provisions of said Part III.

17. In holding and adjudging that the rates and charges set forth in Part X, section 2, of said general schedule of rates and charges effective January 1, 1951, constitute rates and charges for common use facilities at the San Francisco Airport consisting of fire protective service and that TWA is obligated to pay the City the rates and charges set forth in said Part X, section 2, any provision of said lease and agreement of October 1, 1942, to the contrary notwithstanding; for this reason the District Court also erred in finding and adjudging that there is due, owing and unpaid from TWA to the City for the period January 1, 1951, through December 31, 1954, the sum of \$9,600 or any sum as and for fire protective service charges in accordance with the provisions of said Part X, section 2.

18. In deciding and adjudging that said schedule effective January 1, 1951, supersedes section 3 or any part of said lease and agreement, because said schedule or any action of the City given such effect is invalid under the

Constitution of the United States, in that (a) it takes TWA's property without due process of law, and denies TWA the equal protection of the laws contrary to section 1 of the Fourteenth Amendment; and (b) it impairs the obligation of contract, to-wit, said lease and agreement dated October 1, 1942, contrary to section 10 of Article I. Said action of the City also violates the due process and impairment of contract clauses of the Constitution of California, namely sections 13 and 16 of Article I thereof.

For all reasons herein set forth severally and collectively, and without limitation of any specification by any other, the District Court erred in not making and entering a judgment herein that said lease and agreement of October 1, 1942, executed by TWA and the City is binding on the parties thereto in all its parts and for its full term.

---

### SUMMARY OF ARGUMENT.

Appellant submits for the following reasons that the judgment of the trial court is wrong and that the lease-contract of October 1, 1942, between the City and TWA is fully binding.

#### I.

(City had lawful power to make contract in suit and contract fully binding.)

Regardless of whether the City has or has not utility rate-making power with respect to use of airport facilities by the airlines, it unquestionably had in 1942 (and has now) explicit statutory authority to *contract* regarding

charges for and conditions of such use; in other words, express statutory authority to make the 1942 agreement with TWA. Where a municipality has statutory power to contract and chooses to proceed by contract, as the City did here, then it is bound by the contract for the full term, and it cannot avoid the contract by exercising its power of rate regulation if such exists. The law to this effect is settled by decisions of the Supreme Court and of the Ninth Circuit.

The contracting power authorizing the agreement in suit is provided by state statute. This statute being explicit, there is no need to consider whether the City has a like power under its freeholders' charter. The reasons are (1) that under the California constitution a city with a freeholders' charter is bound by the general law except as to municipal affairs; (2) the operation of the San Francisco International Airport, used as it is in international, national and state-wide air traffic as well as by military aircraft, is not "a municipal affair"; and therefore (3) if there were inconsistency between the state statute and the charter on the point in question, the state statute would control.

But if the case could be considered as involving a municipal affair, nevertheless the City's authority to contract concerning the airport facilities and consequent authority to make the agreement in suit would still exist for two reasons: (1) because under the California constitution since 1914 a city with a freeholders' charter has all powers over municipal affairs not expressly withheld, and the San Francisco charter does not withhold the con-

tracting power material here, and, independently, (2) on a fair construction affirmatively grants such power.

In addition to the express provisions of law, there is the strongest kind of administrative construction extending over years and consistent only with the view that the contract was lawfully authorized and completely binding.

It is thus shown that the contract in suit was within the City's authority to make, regardless of whether the question of authority is viewed from the standpoint of the state statute, or of the charter, or of the state constitutional provision on municipal affairs, or of long-continued practical construction. A valid contract cannot be superseded by unilateral action of the City. This is true both as a general proposition of law and under provisions of the State and Federal constitutions.

## II.

(Utility rate-making power immaterial in this case, but actually nonexistent.)

For reasons given, the existence of utility rate-making power as claimed by the City is immaterial to the present case. Actually, however, the power does not exist, and we submit that the Court should so decide if the issue were material.

The City operates the airport in its proprietary capacity. It has broad powers of management, including broad contracting power, as is essential for the purpose of management. It claims also the governmental power of rate regulation as to charges to the airlines for common use facilities of the airport, and this claim it based in its arguments to the trial court on certain provisions of the

charter. Without conceding the charter is controlling on a question of this character, we point out that the power claimed by the City is not expressly granted and cannot be implied from the charter provisions, of doubtful meaning at best, on which the City relies. Such implication would be against long-continued practical construction, and would also conflict with express requirements of the charter concerning public utility rate making. These requirements were not met by the schedule of January 1, 1951.

### III.

(If contract voidable, which it is not, City has taken no action sufficient to avoid it.)

Even if the contract were voidable by exercise of utility rate-making power (which appellant always denies), still the present judgment could not stand because the City has not taken action sufficient to avoid the contract. Where a contract is voidable by reserved regulatory authority, it remains in effect unless and until the regulatory body, after a hearing on that particular contract, expressly sets it aside as against public interest. The authorities are clear to this point. Here the Public Utilities Commission has not only failed to take such action, but has *expressly excepted* the agreement in suit from the schedule by which the City claims, and the trial court held, that the agreement has been partially superseded.

## ARGUMENT.

### I.

ASSUMING, WITHOUT CONCEDED, THAT THE CITY HAS RATE-MAKING POWER WITH RESPECT TO USE OF THE AIRPORT FACILITIES BY THE AIRLINES, IT ALSO HAS AND HAD IN 1942 EXPLICIT STATUTORY AUTHORITY TO CONTRACT REGARDING CHARGES FOR AND CONDITIONS OF SUCH USE; I.E., AUTHORITY TO MAKE THE LEASE-CONTRACT IN THE CASE AT BAR. HAVING ELECTED TO CONTRACT RATHER THAN TO PROCEED BY REGULATORY PROCESS, THE CITY IS BOUND BY THE CONTRACT FOR ITS FULL TERM.

A. The City's authority to make the contract in suit.

1. The state statute.

In 1942 there was in effect a state statute called the Municipal and County Airport Law (Cal.Stats. 1927, p. 485). This statute authorized any city, county, or *city and county* (the latter a specific reference to San Francisco, which is the only city and county in the State), *whether operating under freeholders' charter or otherwise*, to build airports (sec. 1); it authorized municipalities to incur indebtedness and issue bonds for airport purposes (sec. 2); it validated prior proceedings taken and debts incurred (sec. 3); and it provided municipal powers over the use of airports and their facilities (sec. 4). These powers *expressly included the authority to lease and to contract as to airport lands, building space and all other facilities*. Section 4 provided (Cal. Stats. 1927, p. 487):

“In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such **city and county** \* \* \* or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal,

the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith \* \* \* to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air."

The above statute is printed in full in the Appendix. It was repealed in 1949, but similar provisions, quoted in the Appendix, were put into Government Code sections 50470-50478. Like the 1927 statute these sections expressly apply to a city and county and to chartered cities, and they expressly include power of lease and contract as to ground, building space, and facilities alike.<sup>7</sup>

---

<sup>7</sup>Cases citing the airport statutes are *Krenwinkle v. City of Los Angeles* (1935) 4 Cal.2d 611, 51 P.2d 1098, and *Pipes v. Hildenbrand* (1952) 110 Cal.App.2d 645, 243 P.2d 123. In the former case the court upheld the power of the City of Los Angeles to conduct an airport (4 Cal.2d 614). In the latter case the court by writ of mandate directed the city treasurer of Fresno to make payments on contracts for the erection of hangars at the Fresno Air Terminal. The court mentioned the statutory power to lease airport facilities (see 110 Cal.App.2d 647).

See also sec. 26020 of the Govt. Code superseding former Po Code sec. 4056c. It applies to county airports and gives county boards of supervisors various powers, including the right to make leases of airport facilities ("buildings, structures, lighting and other equipment and facilities necessary for such use").

2. The charter—Since the state statute contains an explicit grant of contracting power, there is no need to consider other provisions of law. But if the charter and state constitutional provisions about municipal home rule were material, these also would sustain the contracting power material to the case at bar.

Since the state statute explicitly authorizes such agreements as that in suit, there is no need to consider whether the City charter confers a like authority. The reason is that under sections 6 and 8(j) of Article XI of the California constitution, a city with a freeholders' charter is bound by general law except as to "municipal affairs," and the operation of the San Francisco International Airport is not "a municipal affair." The airport is used by international, national and state-wide air traffic, as well as by military aircraft. The charges for common carrier air traffic, freight and passenger, are regulated by federal and state authority (see 49 U.S.C. 642; also *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723). Under the state constitutional provisions above referred to, if there were any inconsistency between the state statute and the charter on the question of the City's right to contract regarding use of airport facilities by scheduled airlines, the state statute would control, since a municipal affair is not involved.<sup>8</sup>

---

<sup>8</sup>*Civic Center Assn. v. Railroad Comm.* (1917) 175 Cal. 441 450-451, 166 Pac. 351, holding that the State Railroad Commission has the right, and the City of Los Angeles no right, to compel railroads to establish a union depot in Los Angeles; *Bay Cities Transit Co. v. Los Angeles* (1940) 16 Cal.2d 772, 777, 108 P.2d 435, holding that the city has no right to divert busses from the Venice freeway; *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 783-785, 108 P.2d 430, holding that the city has no right to require two-men crews on earlines serving both the city and the outlying areas.

In *Ex parte Houston* (1950) 93 Okl.Crim. 26, 224 P.2d 281. involving the city's contract with limousine operators at the Will

If, however, the case could be considered as involving a municipal affair, it would still be true that the City had authority to make the agreement in suit. The first reason for this is that the charter does not expressly withhold the power to contract concerning the airport facilities. In *West Coast Adver. Co. v. San Francisco* (1939) 14 Cal.2d 516, 95 P.2d 138, the Supreme Court of California, referring to the 1914 amendments of the state constitution on municipal affairs, said (pp. 521-522):

“It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter [citing cases] \* \* \*.

The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution to complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly

---

Rogers Municipal Airfield in Oklahoma City, the court said (p. 291):

“In considering the issues involved in the within case, we would not overlook that ‘While airports are local in nature, they are part of the national program in respect to financial aid, establishment, and maintenance, to the extent that they perform their function as a part of a unified and nationwide activity.’ Law of Aviation, Fixel, 3d Ed., p. 176 (The Michie Company).”

forbidden may be exercised by the municipality and any limitations upon its exercise are those only which have been specified in the charter.”<sup>9</sup>

Under the above rule, and still assuming without conceding that we are dealing with a municipal affair, there is no need to search the charter for an affirmative grant of contracting power. We submit, however, that such power does affirmatively appear, which is a further and independent reason showing that the agreement in suit was authorized.

The San Francisco charter was ratified by the people on March 26, 1931, ratified by the legislature on April 13, 1931, and became effective on January 8, 1932 (Cal. Stats. 1931, c. 56, p. 2973). Later amendments will be noted where material.

Section 2 of the charter provides in its opening paragraph that the City has power to “sell, lease and convey real and personal property,” and in its concluding paragraph that the City shall “have all rights and powers appropriate to a county, a city, and a city and county.” Contracting powers granted to municipal airports by general law seem clearly “appropriate.”

Section 93 provides for lease of city property, and in 1942 authorized “such lease for a period not to exceed twenty years, to the highest responsible bidder at the

---

<sup>9</sup>See also *San Francisco v. Boyd* (1941) 17 Cal.2d 606, 617, 110 P.2d 1036; *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598-599, 212 P.2d 894; *The City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549, 103 P.2d 168.

highest monthly rent." Twenty years is the term of the TWA lease.<sup>10</sup>

Section 121 of the charter, reading now as it did in 1942 gives the Public Utilities Commission broad power to manage public utility *and other property* of the City including the airport:

"The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

It is a familiar principle that a statutory authorization to a city to operate and manage municipally owned facilities includes power to provide by lease or contract for their use. This Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, involving a contract between the city and a steamship company regarding use of a city owned wharf, said in part (p. 652):

"We believe that the City of Juneau had power to enter into the contract. At the time of its execution the City had express legislative authority to 'purchase, construct, or otherwise acquire, establish, and operate public wharves.' Sec. 2383(4), Comp. Laws of Alaska, 1933, as amended by Chap. 48, Session Laws of Alaska, 1935. Incident to a power thus ex-

---

<sup>10</sup>In 1942, sec. 93 contained no specific reference to the airport. Under an amendment, effective in 1946, that section now contains express authorization to lease or rent lands devoted to airport purposes (Cal.Stats. 1st Ex.Sess., 1946, c. 8, pp. 219, 221).

pressly granted is the power to make such contracts as are necessary to its effective exercise.”

In *Milwaukee County v. Town of Lake* (1951) 259 Wis. 208, 48 N.W.2d 1, the Supreme Court of Wisconsin approved the following statement by the trial court (48 N.W.2d 13):

“The contracts entered into between Milwaukee County and the common carrier passenger airlines concerning the use by the latter of the facilities of General Mitchell Field, are legal and valid and a proper exercise of the power of Milwaukee County in the management of General Mitchell Field.”<sup>11</sup>

At the trial the City argued against the existence of its own power to contract by citing the first sentence of section 130 of the charter:

“The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction.”

The argument is that this language makes regulation mandatory, hence impliedly excludes contracting authority. But as already shown, the point cannot be carried by implication, since the home rule provisions of the state constitution give the City all powers over municipal affairs “not expressly forbidden \* \* \* in the charter” (*West Coast Adver. Co. v. San Francisco* (1939) 14 Cal. 2d 516, 522, 95 P.2d 138, *supra*).

---

<sup>11</sup>See also *Miami Beach Airline Service v. Crandon* (1947) 159 Fla. 504, 32 So.2d 153, 154, 155, involving Miami International Airport, and *Ex parte Houston* (1950) 93 Okl.Crim. 26, 224 P.2d 281, 290-291, 293, 299, 304-305, involving the Will Rogers Municipal Airport of Oklahoma City.

Further, if section 130 makes it mandatory for the City to regulate, the obvious question is—regulate what? The City answers—charges for facilities used in common by the airlines (Tr. 390). But there is no reason, we submit, to imply regulatory authority over such facilities which is not exercised over airport facilities used in common by other businesses, and no reason, we submit, to imply regulatory authority over common use facilities which the City disclaims as to other facilities of the airport (Tr. 390).

Further, the charter provision that the Commission shall have power to *regulate* does not mean that the City *must regulate* to the destruction of a contracting power otherwise granted. If law gives both regulatory and contracting powers, the powers are alternate and neither excludes the other.

In *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352 involving gas service, it was claimed that a charter proviso “that the council *should have the right* to ‘regulate and prescribe’ the rates and charges” (p. 359) was destructive of any power to contract about charges. The Supreme Court, overruling this contention, said (pp. 359-360):

“And in the present case, as the other provisions of the charter gave the City authority so to contract we must regard the proviso as merely an **alternative provision**; that is to say, we think that the City might **either contract** as to the rates, as an incident to its power of granting the right to construct and operate the public utility, **or** if it did not exercise this power to contract, might thereafter ‘**regulate** and prescribe the rates in the exercise of the governmental authority conferred by the proviso. **One power, however is not destructive of the other.** And where a munic

ipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding.”

To the same effect are many other cases cited *infra* 35-40.

### 3. Administrative construction.

Having shown the City's statutory (and, if material, charter) authority to make the agreement in suit, we turn to administrative construction. This has been long-continued and powerful, and would be entitled to great weight if the meaning of the statutory provisions were doubtful instead of clear.

Participating in the making of the agreement in suit were the Airport Manager, the Public Utilities Commission, the Public Utilities Manager, the Director of Property, the City Attorney and several of his staff, the Board of Supervisors, and the Mayor (Tr. 36-39, 277-279, 309-315, and *supra* 7-10). The instrument was executed after a public call for bids (Tr. 37-39); a procedure not appropriate to public utility rate making, and which in fact followed the charter procedure for making leases and contracts (Tr. 37-39).

The agreement describes itself as a “lease” (Tr. 14). It is contractual in character throughout. It says nothing about rate regulation. In its negotiation (Tr. 286, 308, 315) and by its terms (sec. 13, Tr. 28-29) the understanding was expressed that the contract charges were not subject to increase by the City. It makes no distinction between hangars and shop space on the one hand, and

common use facilities on the other. It says nothing of rental facilities, in distinction from rate facilities, nor does it purport to be divisible into a lease for hangars and shop space, and a public utility rate tariff for other facilities. To the contrary, it is expressly **not** divisible as concerns obligation. Section 22 provides (Tr. 34):

“22. Lessor agrees that, on payment of the rent and performance of the covenants and agreements on the part of the Lessee to be performed hereunder, Lessee shall peaceably have and enjoy *the leased premises and all the rights and privileges of said airport, its appurtenances and facilities.*”

The City expressly affirmed the original agreement by three separate supplements, the latest on June 2, 1948 (Tr. 43, 51, 54). It acted under the agreement until 1951 without question of its validity. When the Public Utilities Commission made a new schedule in 1946, it expressly excepted existing agreements (City Original Exh B). Where lease charges were altered to coincide with the schedule, as they were with respect to a few items these changes were expressly effected as a matter of contract, and with express reaffirmance of the original 1942 lease (Tr. 45, 51, 53, 54).

In 1947, and notwithstanding that the 1946 schedule was in effect, the City made a term lease with United Airlines of similar nature to its agreement with TWA (Tr. 393), thus again affirming its power to contract.

And when in 1951 the Public Utilities Commission adopted the schedule which the trial court held effective to alter the 1942 TWA contract, the schedule itself was qualified to the contrary by its opening words, “*Except*

as otherwise provided, or amended by agreement'' (Tr. 55).

Under these circumstances we submit as apt the following quotation from *U. S. v. Chicago North Shore R. Co.* (1932) 288 U.S. 1, involving a section of the Interstate Commerce Act (p. 13):

''It would be difficult indeed to conceive a clearer case of uniform administrative construction of §20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons'' (citing many cases).<sup>12</sup>

We submit that the City's authority to make the contract in suit is unquestionably established, from which it follows, under the cases next to be cited, that the City has no right to set the contract aside under its regulatory powers if such exist.

**B. A municipality having both contracting and regulatory powers, and having chosen in a given case to proceed by contract, is bound by that contract.**

**1. The authorities.**

In *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, the city and the company had made a contract whereby the company was to serve the city's inhabitants with gas

---

<sup>12</sup>See also *Power Comm'n v. Panhandle Co.* (1949) 337 U.S. 498; *Brewster v. Gage* (1930) 280 U.S. 327; *Housing Authority v. City of Los Angeles* (1953) 40 Cal.2d 682, 256 P.2d 4; *Richfield Oil Corp. v. Crawford* (1952) 39 Cal.2d 729, 249 P.2d 600; *Palaske v. City of Long Beach* (1949) 93 Cal.App.2d 120, 129, 208 P.2d 764; *Nelson v. Dean* (1946) 27 Cal.2d 873, 168 P.2d 16; *Los Angeles v. Superior Court* (1941) 17 Cal.2d 707, 112 P.2d 10.

for a term of years at a rate not over a stated maximum. After several years' performance, the company tried to raise the rate, claiming that the contract rate had become confiscatory. In the case at bar it is the City, not the company, which is trying to raise the rate, but the basic legal contention was the same in the *St. Cloud* case as it is here, namely, that the subject matter involves public utility rate making, and therefore that the contract is not binding. The Supreme Court defined the issue thus (pp. 355-356):

“And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. *Southern Iowa Elec. Co. v. Chariton*, 255 U.S. 539, 542, and cases there cited; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 273; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. *Its solution turns upon the questions whether the City had power to contract on this subject by the ordinance of 1905; and, if so whether the ordinance constituted such a contract.*”

The Supreme Court then found that under the state statutes including the city charter the city had both contracting and regulatory authority. It held these powers nonexclusive, and further held that the city had made a contract and was bound by it (pp. 359-360):

“And in the present case, as the other provisions of the charter gave the City authority so to contract

we must regard the proviso as merely an alternative provision; that is to say, we think that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rates in the exercise of the governmental authority conferred by the proviso. *One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding.*"

*Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U.S. 496, involved a contract between the city and the water company covering two subjects, first, hydrant service to the city, and second, water service to the inhabitants. The contract fixed charges for both services and was for a 30-year term. It had been made under a Mississippi statute authorizing the city

"\* \* \* 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties, who shall build and operate waterworks'" (206 U.S. 497).

Later the city tried to control the rates by ordinance, and the company filed suit. The Supreme Court sustained the contract. It pointed out that the city had contracting power under the Mississippi statute, and quoted from a Mississippi case (206 U.S. 511):

" 'The power to contract is an essential attribute of sovereignty and is of prime importance. Its exer-

cise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. *The power to contract implies the power to make a valid contract.*’ ”

Further, the Supreme Court said (pp. 515-516):

“In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg the right to make a contract for a supply of water, *it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and, in the absence of a showing of unreasonableness ‘so gross,’ as the court of Mississippi has said, ‘as to strongly suggest fraud or corruption,’ this action of the council is binding, and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.*

While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city.”

The “former case” referred to in the above quotation is *Vicksburg v. Waterworks Co.* (1906) 202 U.S. 453. The two *Vicksburg* cases were followed in *Riverside & A. Ry. Co. v. City of Riverside* (C.C.S.D.Cal. 1902) 11 Fed. 736. The court there granted an injunction based on

the due process and impairment of contract clauses, forbidding the city from shutting off electric power which it had agreed to furnish the street railway for a period of years under a contract. In the *Riverside* case the City was furnishing electricity to a privately owned common carrier; here the City is affording the use of airport facilities to the airlines. The parallel is obvious.

Even more closely in point is the decision of this Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, sustaining a contract between the city and a steamship company relative to the use of a municipally owned public wharf. This case is not quoted at this point for the reason that it is stated at length in the next subdivision of this brief in rebuttal of certain arguments and distinctions made by the trial court in its opinion (see *infra* 38-41).

In *R. R. Comm'n v. Los Angeles R. Co.* (1929) 280 U.S. 145, 151, 153, and in *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265, 273, the Supreme Court stated the same rule as the *St. Cloud* case and other cases cited above, but held that under particular California statutes the city had no power to contract as to street railway rates in the one case and telephone rates in the other. In the case at bar the contracting authority of the City is clear.

The legal rule developed in the foregoing line of cases is thus summarized in "The Supreme Court and the Contract Clause" (57 Harv.L.Rev. (1944) 512, 663):

"Many contracts concerning rates are made, not by the state itself, but by a municipality, and the controversy generally turns on whether under the state constitution the municipality had power to make the

contract. If it had, no question seems to arise as to its binding character. As stated by Justice Sanford in *St. Cloud Public Service Co. v. City of St. Cloud*, a state may authorize a municipality 'to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time.' How long a time would be 'grossly unreasonable' was not stated; the contract sustained in that case was for thirty years."

2. The trial court's distinction of the above authorities is not valid, and the authorities cited by the trial court are not in point.

The only distinction which has been offered of any of the foregoing authorities was stated as follows by the trial court, referring to the *St. Cloud* and *Home Telephone* cases (Tr. 175; 119 F.Supp. 520):

"The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated."

*With greatest respect for the trial court, we submit that the above statement does not distinguish, but on the contrary emphasizes the controlling force of the decisions cited. A much stronger showing of statutory authority is needed to uphold a contract fixing rates which a public service corporation will charge the consuming public than to uphold a contract providing charges to be paid to the city itself by the user of a municipally owned facility. As so demonstrating, we cite Femmer v. City of Juneau (9 Cir. 1938) 97 F.2d 649.*

The *Femmer* case involved a municipal wharf used by shipping generally; in the idiom of the case at bar, a common use facility. The contract sustained by the court was between the city and *one user* of the wharf, a steamship company—the exact type of contract which the trial court holds in the present case cannot be binding. Under Alaska law the City of Juneau had power to contract *implied* from its statutory authority to operate the wharf (97 F.2d 652, 654); the case at bar is stronger because the statutory contracting authority is *express*. The City of Juneau also had statutory authority to regulate public utility rates (Compiled Laws of Alaska 1933, sec. 2383). This Court upheld the contract, saying (p. 654):

“The power of the City to fix rates and charges for the use of municipally owned services is necessarily to be implied from the direction in subsection fourth of section 2383, as amended by Chap. 48, Session Laws of Alaska, 1935, to operate and maintain such public utilities, by ‘revenue collected for service rendered by such plants or utilities from the customers or users thereof.’ We have already seen that the power to make the Northland contract attached as an incident to the specific power to operate public wharves granted by this subsection. *Having the power to grant to Northland a right of user of the wharf and having the power to fix charges for such user the City ipso facto had the power to stipulate that during the duration of the contract the charge would remain constant.* Without such power the City could not have obtained a guaranty of a steady and sustaining patronage.”

The *Femmer* case not only sustained the contract, but also sustained it against the same kind of attack as San

Francisco makes here, namely, attempted exercise of a statutory authority to regulate rates. This Court said (p. 654):

“In connection with his argument on this point appellant has cited subsection tenth of section 2383 and section 2402, Comp.Laws of Alaska, 1933. Those statutes are not here applicable. This is not a case where the City has attempted to contract away its power to fix and from time to time change the rates to be charged by *private organizations* engaged in furnishing public services. Such action is prohibited by the cited sections. But the sections have no effect upon the power of the City to contractually fix the rate to be charged a user of a *municipally owned* public utility” (court’s emphasis).

A like distinction, i.e., between interference by a public authority with contracts of private persons and attempted rejection of contracts of its own is made by the Supreme Court in the gold clause cases of *Norman v. B. & O. R. Co.* (1935) 294 U.S. 240, and *Perry v. United States* (1935) 294 U.S. 330, decided the same day. In the *Perry* case the Court said (294 U.S. 350-351):

“There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.”

The above principle, applied by this Court in the *Femer* case to a situation completely analogous to that in the case at bar, is highly important. It brings out not only

the invalidity of the trial court's distinction of the *St. Cloud* case, but also the fundamental difference between the case at bar and the type of case relied on by the trial court in reaching the decision appealed from.

The typical situation in which regulatory commissions have been held authorized to set aside contracts is one wherein a privately owned utility and a consumer executed a contract for utility service before there was a regulatory statute, or before the statute made regulation mandatory. The cases hold that such a contract is made subject to the state's reserve power of future regulation, and therefore may be set aside when regulation comes. The cases relied on by the trial court are of this character (119 F. Supp. 520; Tr. 176-178).<sup>13</sup> **None of them** involved contracts made by a municipality or other governmental body; therefore, they simply are not in point as the above quotation from the *Femmer* case makes clear (97 F. 2d 654). One of the cases cited by the trial court recognizes the same distinction (*Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232). Although the case held that the State had power to regulate a contract which private persons had made for the supply of water, the opinion went on to say (174 Cal. 238):

“We are speaking, of course, of a situation where the state cannot be held as matter of fact to have sur-

---

<sup>13</sup>For example, *Law v. Railroad Commission* (1921) 184 Cal. 737, 195 Pac. 423; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033; *Pinney & Boyle Co. v. L. A. Gas etc. Corp.* (1914) 168 Cal. 12, 141 Pac. 620; *Midland Co. v. K. C. Power Co.* (1937) 300 U.S. 109; *Union Dry Goods Co. v. Georgia P. S. Corp.* (1919) 248 U.S. 372.

rendered to the public utility involved, by something tantamount to a contract between it and the public utility, any portion of this regulatory power, which is the situation here.”

When San Francisco and TWA made the 1942 lease, the City had statutory power to contract concerning common use facilities of the airport; a power coexistent with regulatory power (if such existed). In the case of a municipally owned facility, unlike one privately owned, contracting power is not subordinate to regulatory power. The City, having exercised a valid contracting authority, cannot upset its own act by an exercise of regulatory power. This, we submit, is settled by the cases cited.

**C. California cases dealing with municipal contracts generally.**

The authorities cited in the last subdivision of this brief involved contracts comparable in subject matter with the contract in the case at bar, and demonstrate, we submit, that that contract was authorized and binding. Additionally there are many California cases dealing with municipal contracts generally and holding that a city cannot repudiate an authorized contract any more than an individual can.

In *Guy F. Atkinson Co. v. Offner* (1948) 86 Cal.App.2d 92, 194 P.2d 33, 34, the court said (86 Cal.App.2d 93 94):

“The city was empowered to enter into the contract the aim of which was to construct a public improvement indispensable to the general welfare. Having made the contract it is bound to the same extent and effect as a private individual.”

*Chapman v. State* (1894) 104 Cal. 690, 694, 38 Pac. 457, is one of several California cases which have quoted with approval from a New York case as follows:

“ ‘The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.’ ”<sup>14</sup>

**D. The Federal and State constitutions prohibit the City from setting aside any portion of the contract in suit.**

This being an authorized and valid contract, both its obligation and the property right inherent therein are constitutionally protected against the attempt of the City in this case to set the contract aside. Such action of the City would violate the impairment of contract clause in section 10 of Article I of the Federal constitution, and would violate the due process and equal protection clauses of the Fourteenth Amendment. It would also violate corresponding provisions of sections 13 and 16 of Article I of the Constitution of California.

---

<sup>14</sup>See also Civ.Code, sec. 1635; *M. F. Kemper Const. Co. v. City of L. A.* (1951) 37 Cal.2d 696, 235 P.2d 7; *Brown v. Town of Sebastopol* (1908) 153 Cal. 704, 96 Pac. 363; *Meyer v. State Land Settlement Board* (1929) 99 Cal.App. 337, 278 Pac. 452; *Hensler v. Los Angeles* (1954) 124 Cal.App.2d 71, 268 P.2d 12.

There are many cases supporting these constitutional objections to the City's action, but we need go no further at this point than to mention certain authorities already cited in support of the validity of the contract. These make the express point that municipal action in derogation of such a contract violates the Federal constitution in the particulars above referred to (see *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U.S. 496, 510; *Riverside & A. Ry. Co. v. City of Riverside* (C.C.S.D.Cal. 1902) 118 Fed. 736; *The Supreme Court and the Contract Clause* (57 Harv.L.Rev. (1944) 512, 663, and supra 33-40). The principles stated by these authorities also show violation of corresponding state constitutional provisions.

---

## II.

**IF THE COURT WERE REQUIRED TO DECIDE WHETHER THE CITY HAS POWER TO TREAT CHARGES TO THE AIRLINES FOR COMMON USE FACILITIES AS PUBLIC UTILITY RATES THE DECISION WOULD NECESSARILY BE IN THE NEGATIVE.**

While submitting for reasons given that the City's contracting authority is decisive of this case, regardless of whether utility rate-making power exists or not, we submit that the latter power as here claimed by the City does not exist, and that the Court should so decide if the issue were material.

The City operates the airport in its proprietary capacity.<sup>15</sup> It has broad powers of management; these are

---

<sup>15</sup>A California municipality acts in its proprietary capacity in conducting business enterprises for public benefit, including mu-

both essential and, we submit, sufficient as a matter of practical operation. They unquestionably include the power to make express contracts (*Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654), or to put out a price schedule for airport facilities. We submit that there is no good reason to imply an added governmental authority to be exercised under the police power; i.e., to fix charges to the airlines for certain facilities as public utility rates.

The airport's primary public is not a dozen airlines, but is the air-traveling public—2,500,000 air passengers in and out of San Francisco in 1952 (Tr. 374). The charges of the scheduled airlines are regulated by the Public Utilities Commission of California as to intrastate traffic and by the Federal Civil Aeronautics Board as to interstate traffic (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723; 49 U.S.C. 642). The City of course has no regulatory authority in the situations just mentioned. It argued to the trial court that certain provisions of the charter give the power claimed here. Without conceding that the charter is controlling, we point out that the City's argument not only conflicts with long-continued practical construction, but conflicts also with ex-

---

municipal airports (*Marin Water etc. Co. v. Town of Sausalito* (1914) 168 Cal. 587, 594-595, 143 Pac. 767; *South Pasadena v. Pasadena Land etc. Co.* (1908) 152 Cal. 579, 592, 593, 93 Pac. 490; *Pignet v. City of Santa Monica* (1938) 29 Cal.App.2d 286, 287, 84 P.2d 166 (involving Santa Monica airport, a tort case); *Coleman v. City of Oakland* (1930) 110 Cal.App. 715, 719-720, 295 Pac. 59 (Oakland airport, tort case)). In the case last cited the court said (110 Cal.App. 720):

“We have no hesitancy in deciding that in the conduct of an air port the municipality is acting in a proprietary capacity.”

press requirements of the charter concerning public utility rate making.

**A. Analysis of charter provisions under which the City claims utility rate-making authority.**

The City's argument for regulatory authority is to this effect: Under section 121 of the charter the airport is a "public utility"—an inaccurate but presently immaterial assumption, we submit (infra 50-53)—and under section 130 the Public Utilities Commission "shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction"; therefore the Commission may fix charges for common use facilities at the airport against the airlines as public utility rates.

The above argument, we submit, simply assumes the point in issue and fails completely when tested by the full text of the charter provisions, by the City's conduct, and by settled principles of law.

Note first that the supposed public utility is "*the airport*" (sec. 121). That is the subject of utility rate regulation, if regulatory power exists. But most airport charges and activities are *not* regulated (Tr. 384-393). The City is *not* asserting utility rate-fixing authority over the airport, or all its facilities or all businesses using it but over *part* of the facilities used by *one group of users* aircraft operators, principally the scheduled airlines. The City is saying that the charter gives rate-making authority over *facilities used in common by airlines*, but not over facilities used in common by others, such as limousine, bus and taxi companies. Also the City is saying that the air

lines are a "public" which must pay public utility rates. But the charter says none of these things, and they cannot be implied because public utility rate-fixing power cannot be established by implication. In *Siler v. Louisville & Nashville R.R. Co.* (1909) 213 U.S. 175, 194, the Supreme Court said:

"The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction."

The claim for utility rate-fixing authority not only rests on implication but on unreasonable implication; in which regard we refer first to the fourth paragraph of section 130 of the charter:

"Rates for **each utility** shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, **all expenses** of every kind and nature incident to the operation and maintenance of **said utility**, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; \* \* \*."

This language requires rates to be fixed for "each utility," in this case, if the City's contention be accepted, *the airport*. But the City does not fix rates for the airport; it is trying to fix them only for facilities of common use by the airlines. If it has a right to do so, then the charter requires that rates for such use be set in amounts to yield **all expenses** of operation and maintenance "of **said utility**," i.e., the airport, plus interest and amortization of airport bonds; in other words, that the rates be so set that facilities of common use by the airlines will pay all the airport expenses; obviously an impossible

proposition. In fact a great part of airport revenue comes, and presumably always will come, from concessions and other unregulated enterprises (Def. Exh. G; original Exhibit; see Tr. 488, 721).

Section 130 further provides that if the Commission proposes a schedule "for said utility which shall not produce such revenue," i.e., all expenses of the airport plus bond interest and amortization, the Board of Supervisors may, by a two-thirds vote, approve the schedule nevertheless "and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet *such deficit*." The Board certainly would not make a tax levy for the difference between the revenues from the airlines for common use facilities and the entire expense of the airport. It would have to consider the entire revenues, most sources of which are admittedly not subject to utility rate regulation (Tr. 242, 390).

While the foregoing section of the charter (130) does not use the word "airport," it does provide conditions to the fixing of public utility rates. Since these conditions cannot be fulfilled with respect to "rates" for the common use facilities, it follows that power to regulate these "rates" cannot be implied from section 121 of the charter, as the City contends.

As noted before, airline charges to the traveling and shipping *public* are regulated by state or federal authority. Compared with the millions of individuals and businesses served at the airport, the airlines are numerically a tiny group. We do not contend that the existence of a public utility relationship between utility and customer depends wholly on the number of the "public" served, but

do point out such status usually involves a broad public, for example, the customers of a city's water service or municipal railway. Practical necessity requires that public utility status be imposed in such cases, but there is no corresponding need for it in the case at bar and no reason to bring it into existence by strained implications from the statutes.

The name "Public Utilities Commission" should not obscure the fact that the Commission is a managerial as well as a regulatory body, and that its managerial functions extend to **nonutility** as well as utility properties. Section 121 of the charter gives the Commission management and control

"\* \* \* of all public utilities *and other properties* used, owned, acquired, leased or constructed by the city and county, including airports."

In section 130 half the first sentence deals with regulatory authority (in general terms, not with relation to the airport), and the second half with managerial powers unrelated to rate making, such as collecting charges, discontinuing service, and settling tort claims—again showing that the fact that the Public Utilities Commission has power to do something is not decisive of whether its action is managerial or regulatory or of whether the property concerned is or is not a "public utility."

**B. Settled principles of statutory construction and long-continued administrative construction of the charter are against the City's claim of rate-making authority.**

We have quoted *Siler v. Louisville & Nashville R.R. Co.* (1909) 213 U.S. 175, 194, to the point that public utility

status can only be established by clear statutory language and not by implication.

See, also, *Interstate Com. Commission v. Railway Co.* (1897) 167 U.S. 479, 493, 494-495, 505, and, in California, *Allen v. Railroad Commission* (1918) 179 Cal. 68, 85, 175 Pac. 466; *Van Hoosear v. Railroad Commission* (1920) 184 Cal. 553, 555, 194 Pac. 1003; *Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 733, 227 P.2d 256.

In the case at bar the power claimed by the City not only rests on implication unreasonable under charter provisions, but is also contrary to long-continued administrative construction. We will not repeat things already said on the latter subject (*supra* 31-33), but do point out that whereas some of this construction would not be inconsistent with a power of utility rate regulation *coexisting* with power to contract, *none* of it harmonizes with an *exclusive* rate-making power, and some of it cannot be reconciled with the existence of a utility rate-making power at all.

**C. The City's assumption that the airport is a "public utility" for municipal rate-making purposes is not valid, but if it were would not sustain the power here claimed.**

As shown, the City's claim of rate-making authority starts with the assumption that the airport is a public utility. While submitting that the assumption is immaterial, we also submit that it is not valid.

Quoting again the first paragraph of section 121 of the charter:

"The public utilities commission shall have charge of the construction, management, supervision, main

tenance, extension, operation and control of all public utilities **and other properties** used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

Whether the airport is included in "public utilities" or in "other properties," it is in either case used "for the purpose of supplying \* \* \* public utility service," since it provides means whereby the scheduled airlines render common-carrier transportation service to the public, including "inhabitants of the City." Further the airport serves "inhabitants" of the City who are not airline passengers or shippers; this because of the large amount of money which the airport brings to San Francisco and its tremendous stimulation of commerce generally. In all these respects it unquestionably fulfills a "public purpose," but *public purpose* and *public utility* are not synonymous terms (see *Ex Parte Houston* (1950) 93 Okl. Crim. 26, 224 P.2d 281, 304, an airport case). As already shown, no inference on this subject follows from the connection between the airport and the Public Utilities Commission, since the Commission has functions of management as well as regulation, and deals with both utility and nonutility properties.

On fair construction, we submit that the charter puts the airport among nonutility properties to which section 21 refers, (1) for the reasons just given; (2) because of long-continued administrative construction; (3) because the whole pattern of section 130 of the charter providing

for rate regulation of "utilities" is inapplicable to the airport; (4) because public utility status "is never presumed 'without evidence of unequivocal intention'" (*Allen v. Railroad Commission* (1918) 179 Cal. 68, 85, 179 Pac. 466, and authorities supra); and (5) because the airport is in San Mateo County, and a California municipality has no extraterritorial powers of regulation except as expressly conferred by statute (*City of Oakland v. Brock* (1937) 8 Cal.2d 639, 641, 67 P.2d 344; *Mulville v. City of San Diego* (1920) 183 Cal. 734, 737, 192 Pac. 702) and the charter provisions invoked in this regard by the City are reasonably to be read as applying only to extra territorial *proprietary* functions.

We have found no case in any jurisdiction holding that the subject of this suit, i.e., charges to the airlines for airport facilities, is a matter for municipal rate regulation. Municipal corporations, of course, have no general rate-regulating powers over airports. A few cases have said that an airport is a public utility, but in all these the situations of fact and law were different than here. For example, *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N.E.2d 656, cited in the trial court's opinion (Tr. 171), did not involve rate regulation but whether the "airport property was exempt from taxation."

But even if the airport were a public utility, that fact would not answer the question in the case at bar. Even privately owned public utilities normally contract for services *rendered to them*, and this is a matter of management beyond the reach of regulation, even where both contracting parties are privately owned public utilities (*Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822, 215 P.2d 441; *Marin etc. Water Co. v. Town*

*Sausalito* (1914) 168 Cal. 587, 596, 143 Pac. 767; *City of Des Moines v. City of West Des Moines* (1948) 239 Iowa 1, 30 N.W.2d 500, 504). The airport can make public transportation service available only through the scheduled airlines, and their operations involve just as much a service by them to the airport as a service by the airport to them. Further, and this point is fundamental, the City had statutory authority to make the agreement which it is now trying to set aside by exercise of regulatory power. The authorities, we submit, conclusively show that this cannot be done whether the airport is a public utility or not (*supra* 33-40).

---

### III.

**EVEN IF THE CONTRACT WERE VOIDABLE BY THE EXERCISE OF UTILITY RATE-MAKING POWER, STILL THE PRESENT JUDGMENT COULD NOT STAND BECAUSE THE CITY HAS NOT TAKEN ACTION SUFFICIENT TO AVOID THE CONTRACT.**

We have so far argued that the agreement of October 1, 1942, being valid, cannot be avoided by utility rate-fixing authority even if the City has such authority. But if the agreement were voidable by regulatory authority (which we deny), the Public Utilities Commission has not avoided it.

- A. The trial court held that the 1951 schedule of the City Public Utilities Commission partially superseded the 1942 agreement, but the schedule itself expressly excepted existing agreements from its operation.

As said before, the schedule of the City's Public Utilities Commission effective January 1, 1951, commenced as follows (Tr. 55):

“Except as otherwise provided, or amended by agreement, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

The meaning of this provision is too clear, we submit to permit of argument. Under it the schedule simply cannot have partially or at all superseded the contract in suit as adjudged by the decree below.

**B. The contract even if voidable, would not be avoided unless and until the Public Utilities Commission made an express finding after hearing that the contract is unreasonable and against public interest. There has been no such hearing or finding.**

The 1951 schedule would not avoid the 1942 contract even if it had not expressly excepted the existing agreement from its operation. We have, we submit, demonstrated that the City had authority to make this agreement and that it could not under any circumstances be superseded by municipal regulation. However, even in cases involving contracts which might be set aside under the power of utility rate regulation—the type of case relied on by the trial court, but completely distinguishable from the case at bar (*supra* 40-42), the courts have held that a utility rate contract is not impaired by a unilateral filing of new rates unless the statute expressly so provides. The contract continues operative unless and until the regulatory body holds a hearing *on that contract* and makes an *express finding* that the contract is unreasonable and contrary to public interest. The cases to this effect are very numerous, as shown in the

footnote, but the rule can be brought out by brief quotations from two or three.<sup>16</sup>

In *Wichita R. R. v. Pub. Util. Comm.* (1922) 260 U.S. 3, a utility and its customer made a contract for furnishing electric service at agreed rates. Thereafter the utility filed an increased schedule with the State Public Utilities Commission, which approved the schedule but without any finding that the contract rates were unreasonable. The Supreme Court held that the contract would continue in effect until such finding after due hearing could be made. The Court quoted from the Kansas case of *Kaul v. American Independent Telephone Co.* (1915) 9 Kan. 1, 147 Pac. 1130 (260 U.S. 58):

“The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the con-

---

<sup>16</sup>*Allen W. Hinkel Dry Goods Co. v. Wichison I. Gas Co.* (10 Cir. 1933) 64 F.2d 881, 883; *Attleboro Steam & E. Co. v. Narragansett E. Light Co.* (D.R.I. 1924) 295 Fed. 895, 901, 903; *Jefferson Deposit Co. v. Central Illinois Light Co.* (1923) 309 Ill. 262, 10 N.E. 817, 819, 820; *Western Distributing Co. v. City of Mulvane* (1924) 116 Kan. 472, 227 Pac. 362, 363; *Traverse City v. Citizens' Telephone Co.* (1917) 195 Mich. 373, 161 N.W. 983, 988; *Putland Ry., Light & Power Co. v. Burditt Bros.* (1920) 94 Vt. 41, 111 Atl. 582; *Commonwealth v. Shenandoah River Light & Power Corp.* (1923) 135 Va. 47, 115 S.E. 695, 702-703.

See also *Lamb v. Calif. Water & Tel. Co.* (1942) 21 Cal.2d 33, 144 P.2d 371; *Southern Pac. Co. v. Spring Valley W. Co.* (1916) 173 Cal. 291, 298, 159 Pac. 865.

The recent case of *Tyler Gas Service Co. v. United States Gas Pipe Line Co.* (5 Cir. 1954) 217 F.2d 73, upheld impairment of a contract by a rate schedule but on the ground that the statute so required. The *Mobile* case (215 F.2d 883) to which it refers is stated in the text. See also *Sierra Pacific Power Co. v. Federal Power Commission* (App.D.C. Feb. 24, 1955) 23 U.S. Law Week 33, 2441.

tract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Supreme Court further said (260 U.S. 58) :

"We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void."

The *Wichita* case was cited in *Mobile Gas Service Corp. v. Federal Power Commission* (3 Cir. 1954) 215 F.2d 883, certiorari granted (Feb.28, 1955, Nos. 436 and 556, October term 1954). There a utility and a customer had made a wholesale gas contract which the utility tried to avoid by filing a rate schedule containing increased charges. The Federal Power Commission accepted the filing. The court nevertheless held the utility liable for schedule rates collected in excess of contract charges in the absence of an express finding by the Commission that the contract was unreasonable. The Commission urged that no such finding was necessary. The court, holding otherwise, said (p. 889)

"So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable."

After quoting from *Colorado Interstate Gas Co. v. Federal Power Com'n* (10 Cir. 1944) 142 F.2d 943, 954

hat "Such rates and charges could be modified only after an express finding of unreasonableness," the court said (215 F.2d 892):

"Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile."

The above case was followed by the Court of Appeals of the District of Columbia in *Sierra Pacific Power Co. v. Federal Power Commission* (App.D.C. Feb. 24, 1955) 3 U.S. Law Week 1133, 2441. This case had not appeared in the Federal Reporter when this brief went to the printer. The filing provisions of the Power Act involved in the *Sierra Pacific* case and the Natural Gas Act involved in the *Mobile* case are very similar.

---

### CONCLUSION.

The judgment appealed from holds that a schedule of the City Public Utilities Commission effective January 1, 1951, is a public utility rate order which partially set aside and superseded the lease-contract of October 1, 1942, between the City and TWA. We submit, for the reasons and under the authorities cited in this brief, that the judgment cannot be supported on any basis or from any point of view. Even if the 1951 schedule was an authorized rate order, which we submit it was not, and even if

it had purported to affect the agreement in suit, instead of providing the contrary by an express exception—still the basic and controlling fact remains that the City, when it made this contract in 1942, had statutory authority to do so, and under settled principles of law cannot set the contract aside by any exercise of regulatory authority.

We respectfully submit that the judgment should be reversed with directions to enter a declaratory judgment sustaining the validity of the contract and its binding force for its whole term.

Dated, San Francisco, California,

March 30, 1955.

LOYD WRIGHT,

EUGENE M. PRINCE,

CHARLES A. LORING,

NOEL DYER,

*Attorneys for Appellant.*

WRIGHT, WRIGHT, GREEN AND WRIGHT,

PILLSBURY, MADISON & SUTRO,

*Of Counsel.*

(Appendix Follows.)

## **Appendix.**



## Appendix

---

### CONSTITUTION OF THE STATE OF CALIFORNIA

#### Article XI, Section 6:

##### “Municipal corporations

**Sec. 6.** Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed; and the Legislature may, by general laws, provide for the performance by county officers of certain of the municipal functions of cities and towns so incorporated, whenever a majority of the electors of any such city or town voting at a general or special election shall so determine. Cities and towns heretofore organized or incorporated may become organized under the general laws passed for that purpose, whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. Cities and towns heretofore or hereafter organized

by authority of this Constitution may, by charter provision or amendment, provide for the performance by county officers of certain of their municipal functions, whenever the discharge of such municipal functions by county officers is authorized by general laws or by the provisions of a county charter framed and adopted by authority of this Constitution.”

**Article XI, section 8(j) (in part):**

**“Municipal Affairs**

It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.”

**CALIFORNIA MUNICIPAL AND COUNTY  
AIRPORT LAW**

**Cal. Stats. 1927, c. 267, p. 485:**

**“Section 1.** Any city and county, or county, or city operating under a freeholders’ charter, or otherwise, or any town, or any municipal corporation, in the State of California, is hereby authorized and empowered to acquire by purchase, condemnation, donation, lease or otherwise real or personal property, or to use any real property owned by it, or which it may hereafter acquire, within or without its corporate limits for a site upon which an airport or airports may be maintained and upon which any such city and county or county or city or town or

municipal corporation may erect and maintain or permit the erection and maintenance of hangars, mooring masts, flying fields, and all places for flying take-off and landing of aircraft and the storage of the same when not in active use, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient, and to levy taxes for the purpose of raising funds to acquire lands for the purposes mentioned in this act and to pay the principal and interest of any bonds issued pursuant hereto.

Any lands previously acquired by any such city and county, or county or city operating under a freeholders' charter or otherwise, or any town or any municipal corporation in the State of California for park purposes, may be used for any of the purposes in this section specified; it being hereby specifically declared that the purpose specified in this section shall constitute park purposes.

The foregoing sentence shall not be construed to limit or confine the uses specified in this section to lands acquired for park purposes.

**Section 2.** [Provides for incurring indebtedness to carry out purposes of Section 1.]

**Section 3.** [Provides procedure for issuance of bonds for airport purposes.]

**Section 4.** In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county, or county, or city operating under a freeholders charter or otherwise, or

town, or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal, the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith, to own and operate municipal aircraft, to employ pilots, to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport, to perform any duties necessary or convenient for the regulation of air traffic, to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

**Section 5.** All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.”

(Repealed, Cal. Stats. 1949, c. 81, sec. 3, p. 327, except sec. 3. See, however, Government Code secs. 50,470 et seq., reprinted *infra*, based on the foregoing statute and effective in 1949.)

## **CALIFORNIA GOVERNMENT CODE**

### **Section 50001:**

“ ‘Local agency.’ ‘Local agency’ as used in this division means county, city, or city and county, unless the context otherwise requires.”

## Section 50470.

**“Right to acquire and use property for airport: Erection and maintenance of air navigation facilities.** Whether governed under general laws or charter, a local agency may acquire property by purchase, condemnation, donation, lease, or otherwise for the purposes of this article and may use any real property which it owns or acquires within or without its limits as a site for an airport. The local agency may erect and maintain hangars, mooring masts, flying fields, and places for flying, take-off, landing, and storage of aircraft, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures, and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient.”

## Section 50474.

**“Powers in connection with erection or maintenance of airports and facilities.** In connection with the erection or maintenance of such airports or facilities, a local agency may:

(a) Regulate the receipt, deposit, and removal, and the embarkation or debarkation of passengers or property to and from such landing places or moorage.

(b) Exact charges, fees, and tolls, and enforce liens or their payment.

(c) Lease or assign for operation any space and any necessary or useful appurtenances, appliances, or other conveniences.

(d) Own and operate aircraft.

(e) Employ pilots.

(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport.

(g) Perform any duties necessary or convenient for the regulation of air traffic.

(h) Enter into contracts or otherwise cooperate with the Federal Government or other public or private agencies.

(i) Exercise powers necessary or convenient in the promotion of aeronautics and commerce and navigation by air."

#### **Section 50475.**

**"Contracts with State or United States: Leases, licenses etc.** A local agency operating or maintaining an airport may grant leases, licenses, concessions, and other privileges, regarding aviation facilities to the State or the United States, for the use or occupation of hangars structures, work, or other aviation facilities by the War Department, Navy Department, National Guard, or other state or federal departments or agencies in connection with aviation or air commerce."

#### **Section 50476.**

**"Same: Acquisition or construction of airport facilities** The legislative body may acquire or construct hangars structures, works, or other facilities on the airport re

quired for such uses and may enter into contracts with the State or the United States.”

#### **Section 50477.**

“**Same: Duration of term.** The contracts, leases, licenses, concessions, or privileges shall be subject to the same limitations as to duration of term provided by law for the granting of leases, licenses, concessions, or privileges to, or the entering into of contracts with, private persons or agencies.”

#### **Section 50478 (Added by Stats. 1951, c. 1018).**

“**Power to lease property for airport purposes or purposes incidental to aircraft: Maximum term.** A local agency may lease or sublease property owned, leased, or otherwise controlled by it for not to exceed 50 years for airport purposes or purposes incidental to aircraft, including:

(a) Manufacture of aircraft, airplane engines, and aircraft equipment, parts, and accessories.

(b) Construction and maintenance of hangars, mooring masts, flying fields, signal lights, radio equipment, service shops, conveniences, appliances, works, structures, and other air navigation, aircraft, and airplane engine manufacturing plants and facilities.”

### **CALIFORNIA GOVERNMENT CODE**

#### **Section 26020 (in part):**

“**Authority of supervisors concerning airports.** As a necessary adjunct to aerial transportation and the use of

aerial highways, the board of supervisors may provide and maintain public airports and landing places for aerial traffic for the use of the public. For such purposes the board of supervisors may:

(a) Acquire by purchase, condemnation, donation, lease, or otherwise real or personal property, either within or without the incorporated territory of municipalities, necessary for such purposes, and improve, construct, reconstruct, lease, furnish, refurnish, use, repair, maintain, and control the property, including buildings, structures, and lighting and other equipment and facilities necessary for such use."

(Effective 1947 this section supersedes similar provision in former Political Code section 4056c.)

## **CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO**

Cal. Stats. 1931, c. 56, pp. 2978-2980:

### **"Powers of the City and County.**

**Section 2** [in part]. The City and County of San Francisco \* \* \* may, subject to the restrictions contained in this charter, purchase, receive, hold and enjoy, sell, lease and convey real and personal property. \* \* \*

\* \* \* \* \*

The city and county may make and enforce all laws, ordinances and regulations necessary, convenient or incidental to the exercise of all rights and powers in respect to its affairs, officers and employees, and shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and lim-

itations provided in this charter, including the power to acquire and construct plants, works, utilities, areas, highways and institutions outside the boundaries of the city and county, and maintenance and operation of the same, and the exercise of functions or maintenance of services outside the boundaries of the city and county, including the expenditure of funds therefor through any agency. The specification or enumeration in this charter of particular powers shall not be exclusive. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors.”

### “Lease of City Property.

**Section 93** [as worded on October 1, 1942, Cal. Stats. 1931, p. 3035]. When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease.

The public utilities commission may provide, by resolution, that agricultural or other lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural purposes shall be subject to lease and administration by the operating forces of the water department; provided, however, that no such lease shall be made to any other public utility without

the approval of the board of supervisors by two-thirds vote thereof.”

### “Lease of City Property.

**Section 93** [as amended and in effect today. See Cal. Stats. 1st Ex. Sess. 1946, c. 8, pp. 221-222]. When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease.

The public utilities commission may provide, by resolution, that agricultural or other lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural or other purposes shall be subject to lease and administration by the operating forces of the water department, and further, the public utilities commission may provide, by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission; provided, however, that no such lease shall be made to any other public utility with-

out the approval of the board of supervisors by two-thirds vote thereof.”

Cal. Stats. 1931, c. 56, pp. 3047-3048.

**“General Powers and Duties of Commission.**

**Section 121.** The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof.

The commission shall locate and determine the character and type of all construction and additions, betterments and extensions to utilities under its control, and shall determine the policy for such construction or the making of such additions, betterments and extensions from the public funds under its jurisdiction; provided that in each such case it shall secure the recommendation of the manager of utilities, which shall be presented in writing and shall include analyses of cost, service and estimated revenues of all proposed or feasible alternatives in cases where it is deemed by the manager that such alternatives exist.

The commission shall also have power to enter into contract for the furnishing of heat, light and power for municipal purposes, and to supervise the performance and check the monthly bills under such contract.

The commission shall have full power and authority to enter into such arrangements and agreements as it shall deem proper for the joint use with any other person, firm or corporation owning or having jurisdiction over poles, conduits, towers, stations, aqueducts, reservoirs and tracks for the operation of any of the utilities under its jurisdiction. It may make such arrangements as it shall deem proper for the exchange of transfer privileges with any privately owned transportation company or system which shall tend toward the betterment of transportation service.

The commission shall observe all city and county ordinances and the regulations of the department of public works relative to utility openings, structures and poles in streets and other public places, as well as all ordinances and regulations relative to barricades, construction lights, refilling excavations and replacing and maintaining street pavements; and in connection with all such matters the said commission shall be subject to the same inspection rules and pay fees to the proper department in the same manner and at the same rates as any private person or corporation.

The commission shall have charge of all valuation work relative or incidental to purchase proceedings initiated by the city and county for the acquisition of any public utility.

Foreign trade zones, as may be authorized by acts of Congress to be located in the city and county, are hereby declared to be public utilities within the meaning of this charter. A bonded indebtedness for the construction, completion or acquisition of foreign trade zones and the ac-

quisition of necessary lands, buildings, and equipment authorized by the electors in accordance with the provisions of this charter shall be exclusive of the bonded indebtedness of the city and county limited by this charter."

**Cal.Stats. 1931, c. 56, pp. 3051-3052.**

**"Rates.**

**Section 130.** The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers, and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service. Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges.

Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the

succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit. All other changes in rates, charges or fares as proposed by the commission shall be submitted by the commission to the board of supervisors for approval, and, except as in this section otherwise provided, it shall require a two-thirds vote of the board of supervisors to reject the rate changes as proposed by the commission, and if so rejected, such proposed changes in schedules of rates, charges or fares shall be returned to the commission for revision. If the supervisors shall fail to act on any such proposed schedule within thirty days, the schedule shall thereupon become effective.’’

**FEDERAL CIVIL AERONAUTICS ACT OF 1938**  
**49 U.S.C. 642:**

“Complaints to and investigations by Board [Civil Aeronautics Board]

\* \* \* \* \*

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or

charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

